LE COP

72-30

Supreme Court, U. S.
FILED
JUL 5 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

WILLIAM A. EGAN, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM A. EGAN, JR.,
Petitioner Pro Se
199 Main Street
White Plains, New York 10601
Phone: (914) 949-2244

July 5, 1972

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented for Review 2

Constitutional Provision Involved 3

Statement of the Case 3

POINT I

Denial of the defense of self-incrimination based on the inclusion of an incriminatory question on a federal income tax return creating the trilemma of prosecution for failure to file, perjury, or self-incrimination, absent a grant of immunity, in a prosecution for failure to file, violates the petitioner's rights under the self-incrimination clause of the Fifth Amendment. This presents a substantial federal question not heretofore determined by this Court 6

POINT II

The denial of the defense of fear of criminal prosecution as negating the element of wilfulness in a prosecution under 26 USC, Section 7203, for failure to file income tax returns is in violation of the due process clause of the Fifth Amendment. This presents a substantial federal question not heretofore determined by this Court 8

PAGE

POINT III

A sentencing process which considers improper factors and evaluates available information erroneously conflicts with the due process clause of the Fifth Amendment. This presents a substantial federal question not heretofore considered by this Court 9

CONCLUSION 10

APPENDIX A—

Opinion of the Circuit Court of Appeals for the Second Circuit:

Per Curiam Opinion 11

APPENDIX B—

Judgment of the U. S. District Court 15

Judgment of the U. S. Court of Appeals 17

Order Denying Rehearing 19

Order Staying Mandate 20

TABLE OF CASES CITED

Blockburger v. United States, 284 U.S. 299 (1932) 9

California v. Byers, 402 U.S. 424 (1971) 6, 7

Gore v. United States, 357 U.S. 386 (1958) 9

Grosso v. United States, 390 U.S. 62 (1968) 7

Haynes v. United States, 390 U.S. 85 (1968) 7

PAGE

Marchetti v. United States, 390 U.S. 39 (1968) 7

Scott v. United States, 419 F.2d 264 (C.A.D.C. 1969) 9

United States v. Fullerton, 189 F. Supp. 211 (D. Md. 1960) 5
United States v. Mitchell, 392 F.2d 214 (2d Cir. 1968) 9
United States v. Platt, 435 F.2d 789 (2d Cir. 1970) 8
United States v. Sullivan, 274 U.S. 259 (1927) 6
United States v. Sweig, 454 F.2d 181 (2d Cir. 1972) 9

STATUTES CITED

26 U.S.C. Section 7203 ..... 1, 2, 3, 8
28 U.S.C. Section 1254(1) 2

U. S. Constitution
Fifth Amendment 2, 3, 6, 8, 9

OTHER AUTHORITY

22 ALR 3d 1173 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

WILLIAM A. EGAN, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William A. Egan, Jr., hereby petitions for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit affirming a judgment of conviction in the United States District Court for the Southern District of New York on four counts of failure to file income tax returns under 26 U.S.C. §7203.

Opinion Below

The *per curiam* opinion below is not reported. It is appended hereto as Appendix A.

Jurisdiction

The judgment sought to be reviewed was made and entered on April 20, 1972. An order denying a timely motion for rehearing was made and entered on June 5, 1972. The statutory provision believed to confer on this court jurisdiction to review the judgment in question is 28 U.S.C. Section 1254(1).

Questions Presented for Review

1. Whether the federal government may, consistent with the privilege against self-incrimination clause of the Fifth Amendment to the United States Constitution, absent a grant of immunity, prosecute a taxpayer for failure to file income tax returns under 26 U.S.C. §7203 when the return required contained an incriminatory question which placed a taxpayer in the trilemma of (a) answering the question falsely under penalty of perjury; (b) answering the question truthfully and confessing the commission of a crime—a claim of privilege on the return being equivalent thereto—under the same §7203; (c) or failing to file and subjecting himself to prosecution under 26 U.S.C. §7203.

2. Whether the denial of a defense of fear of self-incrimination in a prosecution of a taxpayer by the federal government for failure to file income tax returns under 26 U.S.C. §7203 in negation of the element of wilfulness required by said statute is consistent with due process of law required by the Fifth Amendment to the United States Constitution.

3. Whether a sentencing process following conviction of a taxpayer for failure to file income tax returns under 26 U.S.C. §7203 where the court considers improper factors and evaluates the available information erroneously is consistent with procedural due process of law required by the Fifth Amendment to the United States Constitution.

Constitutional Provision Involved

Amendment V, United States Constitution: "no person . . . shall be compelled in any criminal case to be a witness against himself; nor be deprived of . . ., liberty, . . ., without due process of law; . . ."

Statement of the Case

Petitioner did not file federal income tax returns for the years 1960-67 inclusive, although required to do so.

Petitioner is charged under 26 U.S.C. §7203 with unlawfully, knowingly and wilfully failing to file federal income tax returns for the years 1964-1967. Shortly before trial the petitioner moved for acquittal on the ground that to have filed the 1964 return would have required him to reveal in answer to a question on the return—"Enter the name and address used on your return for 1963 (If the same as above, write 'same.' If none filed give reason . . ." —that he had unlawfully failed to file a return in 1963, which would have led to the discovery that he had not filed in 1960-1962 also, although required to file for each of those years. The same contention applied to the returns for 1965-1967. The motion was denied by the trial court. The motion was timely and was timely renewed during the trial, denied and excepted to.

Petitioner raised the defense of fear of self-incrimination as negating wilfulness, the only disputed element of the defenses charged, during the trial by means of a request to charge. The trial court refused to so charge and charged the jury that it could not consider fear of self-incrimination and criminal prosecution on the question of wilfulness. Although the trial court found that "there is no question [he believed that the question] would incriminate him" and that "in answering the question about the prior year would incriminate him . . . threaten him with criminal prosecution."

The jury found the petitioner guilty on all four counts set forth in the information and the trial court sentenced the petitioner to three months jail imprisonment on each count, to run concurrently, and to a fine of $3,000 on count number 1.

Petitioner appealed to the Circuit Court of Appeals for the Second Circuit on three points:

1. That the trial court erred in denying him the defense of self-incrimination;

2. That the trial court erred in denying the defense of fear of self-incrimination on the disputed element of "wilfulness" in the offenses charged; and

3. That the trial court erred in refusing probation and imposing a jail sentence by evaluating the available criteria to describe the offenses as "acquisitive" ones and in considering the raising of the defense of self-incrimination to petitioner's disadvantage, although timely raised.

The Circuit Court of Appeals in a *per curiam* opinion dated April 20, 1972 by Chief Judge Henry J. Friendly and Circuit Judges J. Joseph Smith and James L. Oakes affirmed the convictions below. A timely motion for re-argument was denied by order dated June 5, 1972.

In the petition for re-argument to the Circuit Court petitioner again raised the questions presented here but without opinion the Circuit Court by order dated June 5, 1972 denied re-argument.

The Circuit Court of Appeals expressly decided the constitutional issues raised. It denied the defense of self-incrimination, asserting that the question was not incriminatory and were it incriminatory the privilege must be asserted on the return itself.

It denied the defense of fear of criminal prosecution bearing on the element of wilfulness on the authority of *United States* v. *Fullerton*, 189 F. Supp. 211 (D. Md. 1960).

It denied the defense of procedural due process in sentencing by characterizing the improper factors as proper and by construing the erroneous evaluation of the available information as an accurate evaluation.

POINT I

Denial of the defense of self-incrimination based on the inclusion of an incriminatory question on a federal income tax return creating the trilemma of prosecution for failure to file, perjury, or self-incrimination, absent a grant of immunity, in a prosecution for failure to file, violates the petitioner's rights under the self-incrimination clause of the Fifth Amendment. This presents a substantial federal question not heretofore determined by this Court.

Petitioner is not unmindful of the oft quoted case of *United States* v. *Sullivan*, 274 U.S. 259 (1927), where the court held that the taxpayer was required to claim his privilege with respect to a neutral question except as to him, on the return, nor of *California* v. *Byers*, 402 U.S. 424, 434 (1971), where the court stated "There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement." However, in filing an income tax return where the taxpayer is required not only to state whether he filed for the prior year but to give the reasons for so failing to file and to do so truthfully under penalty of perjury, there is more than the possibility of legal involvement. Nor can the privilege be claimed in answer to the two questions without providing a direct link in a very short chain to criminal prosecution since the evidence of non-filing for the prior year exists within the Internal Revenue Service itself, i.e., no record of a filed return.

The petitioner is also not unaware that a tax return is directed at the public at large and not at an inherently

suspect group as in *Marchetti* v. *United States,* 390 U.S. 39 (1968); *Grosso* v. *United States,* 390 U.S. 62 (1968); and *Haynes* v. *United States,* 390 U.S. 85 (1968), but the question inserted on the income tax return here is not aimed at the public at large quite so clearly; non-filers are not the public at large and except for those with not more than $600 of gross income in the prior year—the Nevada gamblers exception in *Marchetti, supra*—are aimed at a wide range of suspects.

The question here transcends the insertion of the offending question on a tax return. This court has recognized that society has and increasingly will become more populous, urban, industrialized and complex and that government regulation of human affairs has and will correspondingly become more detailed and pervasive. Accordingly, government's need to know has and will continue to become greater. In a free society this necessitates compelled reporting by the citizenry at large. This court in *California* v. *Byers,* 91 S. Ct. 1535, 1537 (1971) recognized that the tension between the State's increasing demand for disclosure and the protection of the right against self-incrimination gives rise to serious questions. And it recognized that the question must be resolved in terms of balancing the public need on the one hand against the privilege against self-incrimination on the other hand.

In *Byers, supra,* this court found that the public need was paramount and that the required disclosures were not incriminatory. In the problem posed in the filing or reporting cases the public need as to those who would be incriminated is not paramount and were it so as to a select group it could be easily remedied by a grant of immunity. Thus in the tax cases, such a grant would eliminate the

application of the privilege against self-incrimination, require the filing and enable the federal government within a year of the failure to file and pay tax, to require the taxpayer to report his delinquent tax and to assess the appropriate penalty and interest and to compel payment.

Therefore this issue, namely, the insertion at an incriminatory question on a return or report otherwise neutral on its face and otherwise aimed at the public at large and on which the constitutional privilege against self-incrimination cannot be asserted, raises an important constitutional issue which has not been decided by this Court.

POINT II

The denial of the defense of fear of criminal prosecution as negating the element of wilfulness in a prosecution under 26 USC, Section 7203, for failure to file income tax returns is in violation of the due process clause of the Fifth Amendment. This presents a substantial federal question not heretofore determined by this Court.

The determination of the meaning of the element of wilfulness required in a prosecution under 26 U.S.C. §7203 for failures to file income tax return has been the source of much and varied judicial interpretation, *United States* v. *Platt,* 435 F.2d 789, 795 (2d Circuit 1970); 22 A.L.R.3d 1173. Petitioner believes this variance in judicial interpretation between the various Circuit courts should be resolved by this court in order to insure due process under the Fifth Amendment.

POINT III

A sentencing process which considers improper factors and evaluates available information erroneously conflicts with the due process clause of the Fifth Amendment. This presents a substantial federal question not heretofore considered by this Court.

Petitioner recognizes the general rule of non-reviewability of sentences within the statutory limit. *Gore* v. *United States,* 357 U.S. 386, 393 (1958); *Blockburger* v. *United States,* 284 U.S. 299, 305 (1932). And petitioner recognizes that a trial judge may consider a wide range of data and factors in arriving at that decision. *United States* v. *Sweig,* 454 F.2d 181, 183-84 (2d Circuit 1972). However, petitioner contends that procedural due process under the Fifth Amendment is denied when a defendant in a criminal case is penalized for failure to enter a plea of guilty, in whatever terms consideration of this factor is couched, when a defendant is penalized for raising the defense of self-incrimination under the Fifth Amendment, although timely raised, and when the available criteria are clearly evaluated erroneously and contrary to the trial court's own findings. *Scott* v. *United States,* 419 F.2d 264 (C.A.D.C. 1969); *United States* v. *Mitchell,* 392 F.2d 214, 217 (2d Circuit 1968).

Petitioner contends that these exceptions to the general rule violate the procedural due process clause, and may well violate the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Petitioner believes that this Court should consider this substantial and fundamental federal constitutional question.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

WILLIAM A. EGAN, JR.,
Petitioner Pro Se
199 Main Street
White Plains, New York 10601
Phone: (914) 949-2244

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 665—September Term, 1971.

(Argued April 13, 1972 Decided April 20, 1972.)

Docket No. 72-1102

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM A. EGAN, JR.,

Appellant.

Before:

FRIENDLY, *Chief Judge,*
SMITH and OAKES, *Circuit Judges.*

Appeal from a judgment of conviction after a jury trial entered in the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge,* for failure to file federal income tax returns for the calendar years 1964 through 1967, in violation of 26 U.S.C. §7203.

Affirmed.

WILLIAM A. EGAN, JR., White Plains, New York, *Appellant Pro Se.*

RUDOLPH W. GIULIANI, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and Peter F. Rient, Assistant United States Attorney, of counsel), *for Appellee.*

PER CURIAM:

We affirm this appeal from a conviction for willful failure to file federal income tax returns for the calendar years 1964 through 1967, in violation of 26 U.S.C. §7203. The principal contention is that, because the income tax returns for those years contained the usual question[1] to be answered by the taxpayer whether returns were filed for prior years, and because taxpayer had not filed returns for the years 1960-63 inclusive, he was put in what has been called the "cruel trilemma": if he filed the return and answered the question truthfully he would have been confessing to a crime; if he answered the question untruthfully he would have been subjecting himself to a perjury charge; if he failed to file the return he would have been committing a crime. *Cf. Marchetti* v. *United States,* 390 U.S. 39 (1968); *Malloy* v. *Hogan,* 378 U.S. 1, 11-12 (1964). *See also United States* v. *Sullivan,* 274 U.S. 259 (1927); Friendly, *The Fifth Amendment Tomorrow: The Case for*

[1] Enter the name and address used on your return for [last year] (if the same as above, write "same"). If none filed, give reason. The return forms for 1965 through 1967 included the additional phrase: "If changing from separate to joint or joint to separate returns enter [last year's] names and addresses."

Constitutional Change, 37 U. Cin. L. Rev. 671, 719-20 (1968). But there might have been any number of reasons not to file returns for the years 1960-63, some of which appellant stated to the Internal Revenue Service—*e.g.,* he had lost money in those years. Answering the question on the return in the negative with an explanation of this nature, if true, would of course not have resulted in criminal charges. But even considering that question were incriminating, since the government has a substantial interest in its tax revenues, appellant's privilege would relate only to his refusal to respond to the question, not to a total failure to file the return. The fifth amendment protects against giving testimony against oneself, not against bringing attention to oneself. *Cf. California* v. *Byers,* 402 U.S. 424, 434 (1971) ("There is no constitutional right to refuse to file an income tax return . . . in order to avoid the possibility of legal involvement").

The court's charge on willfulness was essentially correct. Appellant made a request to charge that, if the jury found that appellant did not file his returns for the years in question for fear of incriminating himself for previous violations, the jury must acquit. But this is no defense, *United States* v. *Fullerton,* 189 F. Supp. 211 (D. Md. 1960), and the court gave the appellant all that, perhaps even more than, he was entitled to by saying that the jury should acquit if it found that appellant believed he had a constitutional right not to file tax returns.

Appellant's remaining argument concerns certain considerations stated by the court while rendering an otherwise perfectly proper sentence. "A trial judge has very broad discretion in imposing any sentence within the statutory limits . . .," *United States* v. *Sweig,* 454 F.2d 181,

183 (2d Cir. 1972), and in the exercise of that discretion he may consider a wide range of data. *See id.* at 183-84 and cases there cited. The characterization of the crime of failing to file income tax returns as "acquisitive" may not have been totally accurate when, apparently, relatively small amounts of dollars were involved. But it is descriptive of the general type of crime as opposed to one of violence, drugs or the like, and the judge was expressing a perfectly proper philosophy of sentencing to the effect that this kind of crime—sometimes called "white collar" or "commercial"—should be treated just as seriously as some of the so-called "ghetto" crimes. Taking note of the defense of self-incrimination as having "come up very late in the game" was supported factually in the record and did not refer to trial tactics, but to appellant's previous explanations for his failure to file.

Judgment affirmed.

APPENDIX B

Judgment of the U.S. District Court

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 71 Cr 55

UNITED STATES OF AMERICA,

—v.—

WILLIAM A. EGAN, JR.

On this 28th day of December, 1971 came the attorney for the government and the defendant appeared in person and by Louis Bender, Esq., of counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly failing to make income tax returns for the calendar years 1964, 1965, 1966 and 1967 to the District Director of Internal Revenue for the Manhattan District, or to any other proper officer of the United States, within the required time. (Title 26, United States Code, Section 7203) as charged in counts 1, 2, 3 and 4 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Months on each of counts 1, 2, 3 and 4 to run concurrently with each other. Defendant is Fined $3,000.00 on count 1.

Execution of sentence is stayed pending appeal. Defendant is continued released on his own recognizance.

A TRUE COPY

JOHN LIVINGSTON
Clerk

By I. WEINBERG
Deputy Clerk

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

MARVIN E. FRANKEL
United States District Judge

JOHN LIVINGSTON
John Livingston
Clerk

Judgment of the U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of April, one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY,
Chief Judge.

HON. J. JOSEPH SMITH,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

WILLIAM A. EGAN, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

WILLIAM A. EGAN, JR.,

Defendant-Appellant.

A petition for a rehearing having been filed herein by appellant pro-se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

June 5, 1972

HENRY J. FRIENDLY
Chief Judge

J. JOSEPH SMITH
JAMES L. OAKES
Circuit Judges

Order Staying Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of June, one thousand nine hundred and seventy-two

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

WILLIAM A. EGAN, JR.,

Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated June 8, 1972, to stay the issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

HENRY J. FRIENDLY
Chief Judge

J. JOSEPH SMITH
JAMES L. OAKES
Circuit Judges